Nos. 82-2003 and 82-2013

In the Supreme Court of the United States

OCTOBER TERM, 1983

LICENSED BEVERAGE DISTRIBUTORS ASSOCIATION,
PETITIONER

v.

UNITED STATES OF AMERICA

STATE OF TEXAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the State of Texas may constitutionally prohibit a congressionally-created "non-appropriated fund instrumentality" from purchasing liquor directly from out-of-state wholesalers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A14)[1] is reported at 695 F.2d 136. The memorandum opinion and order of the district court (Pet. App. A16-A25) is not reported.

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[1] "Pet. App." refers to the appendix to the petition in No. 82-2003.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A2) was entered on January 10, 1983. A petition for rehearing (Pet. App. A15) was denied on March 17, 1983. The petitions for a writ of certiorari in Nos. 82-2003 and 82-2013 were filed on June 8 and 10, 1983, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Texas Alcoholic Beverage Code creates what the State describes as a three-tier regulatory system for the distribution of liquor within the State. Tex. Alco. Bev. Code Ann. § 11.01(a) (Vernon 1978). Nonresident sellers of alcoholic beverages may sell only to resident wholesalers who have a permit, granted by the State's Alcoholic Beverage Commission ("TABC"), which authorizes the wholesaler to import alcoholic beverages into Texas. *Id.* §§ 19.01, 20.01, 37.01 (Pet. App. A4). Wholesale permit holders, who, in turn, sell to resident retailers, are required to pay a tax of two dollars to the State for each gallon of distilled spirits sold. Tex. Alco. Bev. Code Ann. § 201.03(a) (Vernon 1978).

During 1978, three "non-appropriated fund instrumentalities" ("NFI")[2] of the Navy located on bases in Texas concluded that a procurement regulation of the Department of Defense (32 C.F.R. 261.4(c)) authorized them to import alcoholic beverages directly from nonresident sellers

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[2]NFIs, such as officers' and enlisted men's clubs and package stores, are not supported by direct government funding. Their activities, incuding the sale of alcoholic beverages, are expected to generate profits which can be used to fund military recreational and morale programs (Pet. App. A4 n.2).

without complying with Texas's restrictions on the distribution of liquor (Pet. App. A4-A5).[3] Accordingly, the NFIs began to make offers to purchase and to purchase liquor at substantially reduced prices directly from nonresident sellers.

In response to the NFIs' action, TABC sent bulletins to all wholesalers and nonresident sellers in January and July 1978, threatening to take legal action against any nonresident sellers who sold directly to military installations located in the State, bypassing in-state wholesalers (Pet. App. A5).[4] In addition, TABC instituted proceedings against a California distiller for an "unauthorized" sale of alcoholic beverages to a Navy installation, and suspended the distiller's license to export liquor to Texas for seven days (*id.* at A4). TABC also sent a letter to the Navy warning it against further attempts to purchase directly from out-of-state sources (PX 3):

> The Department of the Navy * * * is in direct violation of state law, which prohibits a non-resident seller's permittee to sell to a retailer in the State of Texas, thereby escaping the state gallonage tax on liquor.
>
> * * * * *

[3]32 C.F.R. 261.4(c) provides in pertinent part:

> (1) DOD will cooperate with all duly constituted regulatory officials (local, State and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price, and other factors considered.
>
> (2) This policy of cooperation is not to be construed * * * as an admission of any legal obligation to submit to State control.

[4]The head of the procurement section of the Navy's Recreational Services Division testified that Texas's restrictions on the Navy's sources of supply result in NFIs in Texas paying between $4 and $24 a case more for their supplies than is paid by naval facilities in other states (3 R. 88).

> If you choose to continue to receive shipments of liquor from a non-resident seller, the Texas Alcoholic Beverage Commission will seek any available remedy at law against any and all parties involved in these transactions * * *.

2. The United States filed suit in the United States District Court for the Western District of Texas against the State of Texas and the State's officers responsible for enforcing the alcohol beverage laws. The complaint sought an injunction against the State's attempt to regulate NFI liquor purchases and a declaration that the Texas regulatory scheme for the sale of alcoholic beverages was unconstitutional as applied to NFI purchases pursuant to the procurement regulations. Petitioner Licensed Beverage Distributors Association moved to intervene as a party defendant, and its motion was granted.

After trial, the district court entered judgment for petitioners. The court held that the procurement regulation, 32 C.F.R. 261.4(c)(1), did not authorize NFIs to circumvent state law. Instead, the regulation assumed compliance with local law, and the regulation's reference to "most advantageous contract" simply meant the best price obtainable while complying with Texas's regulatory scheme regarding alcoholic beverages (Pet. App. A24).

The court of appeals reversed (Pet. App. A3-A14). It reasoned that procurement for a military base is a matter of exclusive federal concern and not subject to state regulation (*id.* at A10). The court also rejected petitioners' claim that the Twenty-first Amendment of the United States Constitution granted the State authority to regulate liquor sales to NFIs; it held that the Twenty-first Amendment did not confer power to regulate alcoholic distribution to federal enclaves (Pet. App. A10).

ARGUMENT

1. The court of appeals correctly held that the Supremacy Clause prohibits the State of Texas from regulating the procurement activities of military installations located within its borders. This Court has made clear that federal authority over military procurement is exclusive and any attempt by the State to regulate procurement is impermissible.[5] *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. 187 (1956) (state cannot require construction contractor on military base to obtain license); *Paul* v. *United States,* 371 U.S. 245 (1963) (state minimum milk price inapplicable to purchases by military bases).

In this case, NFIs on naval bases located in Texas sought to purchase alcoholic beverages directly from out-of-state distillers, rather than from Texas wholesalers, because the higher prices of the local wholesalers necessarily reflected their costs of operation (including the Texas gallonage tax) and profit margin. Texas, in order to protect its tax revenues, sought to require the United States to buy only from Texas wholesalers (Pet. App. A5). *Leslie Miller, Inc.* and *Paul* make clear, however, that under the Supremacy Clause the State's liquor regulation cannot be applied to the NFIs' procurement activities[6]

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[5]Article I, Section 8, of the United States Constitution makes plain that the conduct of the military is a matter of exclusive federal concern by granting Congress the exclusive authority to "raise and support Armies," to "provide and maintain a Navy" and to regulate "the land and naval Forces."

[6]Petitioners erroneously contend (82-2003 Pet. 9-11, 17; 82-2013 Pet. 11-13) that the court of appeals' decision was based on facts, not supported by any evidence, with respect to whether the naval bases were within the "exclusive" or "concurrent" jurisdiction of the federal government. The court of appeals specifically stated (Pet. App. A11, n.8), however, that its decision was unaffected by such concepts. Although petitioners point to the use of the term "exclusive zone of federal jurisdiction," the opinion makes clear that it is referring to

2. Petitioners argue (82-2003 Pet. 22-25; 82-2013 Pet. 27-30) that the special grant of authority in the Twenty-first Amendment allowing the states to regulate alcoholic beverages overrides the federal government's right to procure liquor free of state regulation. This argument is without merit.

The Twenty-first Amendment grants the states no power to regulate federal military procurement simply because alcoholic beverages are involved. Compare *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *United States* v. *Mississippi Tax Commission,* 412 U.S. 363 (1973); *United States* v. *Mississippi Tax Commission,* 421 U.S. 599 (1975).[7] The principal purpose of Section 2 of the Twenty-first Amendment is to permit the states to regulate and tax private commerce in alcoholic beverages in a

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subject matters of exclusive federal concern (such as federal military procurement) and not to matters of geography (*id.* at A8-A12). The court discussed geography in the context of rejecting petitioners' claim that the grant of authority in the Twenty-first Amendment over the distribution of alcoholic beverages within the State includes authority to regulate liquor distribution to a federal enclave.

[7]The State argues (82-2013 Pet. 19-22) that the federal government's procurement policies do not necessarily conflict with the State's regulatory scheme. But a conflict exists and requires the State's law to give way. Congress expressly authorized the Secretary of Defense to adopt any regulations he deems appropriate governing consumption of liquor on military bases. 50 U.S.C. App. 473. Obviously, regulations governing procurement have the effect of regulating the consumption of liquor on the base. Accordingly, the procurement regulation is fully authorized by statute.

The regulation in turn clearly states that it, and not state law, shall govern the procurement of liquor for military bases. Since the regulation is supported by statute and was intended to create a federal standard with respect to the cost of liquor, it plainly preempts Texas's alcoholic beverage regulations. Compare *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, No. 81-750 (June 28, 1982), slip op. 11-12.

manner which, without the Amendment, might come into conflict with the Commerce Clause. See *Craig* v. *Boren*, 429 U.S. 190, 206 (1976); *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 62-63 (1936). The Amendment was not intended to increase the authority of the states to regulate the affairs of the federal government.[8] Cf. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (state tax on foreign importer of alcohol struck down, since it violated Export-Import Clause); see also *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 613 (1975) (federal government immune from taxation of purchases of alcoholic beverages). As this Court stated in *Craig* v. *Boren*, *supra*, 429 U.S. at 206, "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful."

3. Petitioners (82-2003 Pet. 8, 18-22; 82-2013 Pet. 5-10) characterize this case as involving the scope of the federal government's constitutional immunity from state taxation, and claim that the decision below is based on a construction of the immunity doctrine which is in conflict with decisions

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[8]Petitioners' reliance (82-2003 Pet. 22-23; 82-2013 Pet. 11, 23) on *Rice* v. *Norman Williams Co.*, No. 80-1012 (July 1, 1982) is misplaced. In *Rice*, this Court held only that a state's regulation of importers of distilled spirits did not, on its face, necessarily conflict with the Sherman Act.

The State petitioners argue (82-2013 Pet. 22) that the regulatory scheme is being applied to the NFIs so that TABC "is * * * able to track the flow of liquor into the State." Compare *United States* v. *Mississippi Tax Commission*, 412 U.S. 363, 378 (1973). The court below, however, acknowledged the State's legitimate interest in protecting against diversion of liquor from the federal enclave into the State, but found that Texas's laws were not " 'an effort to deal with problems of diversion of liquor' " (Pet. App. A14, quoting *Mississippi Tax Commission*, *supra*, 412 U.S. at 378). Given the State's repeated references in its bulletins to the gallonage tax and its failure to cite any instances of diversion, the court's finding is amply justified.

of this Court. See, *e.g.*, *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964). Petitioners assert that like the tax in *Polar Ice Cream* (82-2003 Pet. 19; 82-2013 Pet. 7) the legal incidence of the Texas gallonage tax is on the Texas wholesalers, not their customers, and that, consequently, imposition of the tax with respect to purchases of alcoholic beverages by the military does not violate the immunity of the federal government.

The tax immunity doctrine, however, is not involved in this case. Indeed, the United States expressly conceded in the court of appeals (81-1597 Appellant's Reply Br. 3-4) that the Texas gallonage tax is not an unconstitutional tax on federal instrumentalities, and that, if the NFIs chose to purchase from Texas wholesalers, the State could constitutionally collect the gallonage tax with respect to such purchases. Texas has not, however, simply imposed a tax on local suppliers with whom the NFIs might choose to do business. Rather, it is attempting to regulate military procurement by precluding the NFIs from purchasing alcoholic beverages from any suppliers other than Texas wholesalers. It is this attempted regulation of military procurement that the court of appeals struck down as violative of the Supremacy Clause. Accordingly, there is no conflict with *Polar Ice* and similar decisions of this Court involving the immunity doctrine.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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